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No. 84-1998

In The

Supreme Court of the United States

October Term, 1984

NEW YORK STATE NURSES ASSOCIATION,
Petitioner,

vs.

ST. JOSEPH'S HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

BRIEF OF RESPONDENT ST. JOSEPH'S HOSPITAL IN OPPOSITION

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QUESTION PRESENTED

Whether Respondent St. Joseph's Hospital violated sections 8(a)(1) and (5) of the National Labor Relations Act when it insisted that it had the right to negotiate with the Petitioner over the conditions under which the Petitioner could examine Respondent's books and records to verify a claimed inability to pay a wage increase?

TABLE OF CONTENTS

	Page
Question Presented	*i*
Table of Contents	*ii*
Table of Authorities	*iii*
Statement of the Case	2

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT	2
II. PETITIONER HAS NOT DEMONSTRATED THAT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS	4
III. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION	6
Conclusion	9

TABLE OF AUTHORITIES

Cases	Page
Detroit Edison Company v. National Labor Relations Board, 440 U.S. 301 (1979)	3, 4, 5
Emeryville Research Center, Shell Development Co. v. National Labor Relations Board, 441 F.2d 880 (9th Cir. 1971)	5
Fitzsimmons Manufacturing Co., 251 N.L.R.B. 375 (1982)	7
Howland Hook Marine Terminal Corp., 263 N.L.R.B. 453 (1982)	7
Metlox Manufacturing Company v. National Labor Relations Board, 378 F.2d 728 (9th Cir. 1967), *enf'g*, 153 N.L.R.B. 1388 (1965), *cert. denied*, 389 U.S. 1037 (1968)	4, 7
Metlox Manufacturing Co., 153 N.L.R.B. 1388 (1965), enf'd, 378 F.2d 728 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968)	7
National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432 (1967)	3, 4
National Labor Relations Board v. Tex-Tan, Inc., 318 F. 2d 472 (5th Cir. 1963), *denying enforcement*, 134 N.L.R.B. 253 (1961)	5
National Labor Relations Board v. Truitt Manufacturing Co., 351 U.S. 149 (1956)	3, 4
Oates Brothers, Inc., 135 N.L.R.B. 1295 (1962)	7
Sears Roebuck & Co., Inc., 139 N.L.R.B. 471 (1962)	7
Shell Oil Co. v. National Labor Relations Board, 457 F. 2d 615 (9th Cir. 1972)	5

Page

Westfork Cut Glass Co., 90 N.L.R.B. 944 (1950), *enforced as modified sub nom. National Labor Relations Board v. Borchert*, 188 F.2d 474 (4th Cir. 1951) . 6

Winona Industries, Inc., 257 N.L.R.B. 695 (1981) 8

Yakima Frozen Foods, 130 N.L.R.B. 1269 (1961), *enforced in part and remanded in part sub nom. Fruit and Vegetable Packers and Warehousemen, Local 760 v. N.L.R.B.*, 316 F. 2d 389 (D.C. Cir. 1963) 5, 6

Statutes

National Labor Relations Act §8(a) 2

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BRIEF OF RESPONDENT ST. JOSEPH'S HOSPITAL IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent St. Joseph's Hospital[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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[1] Pursuant to U.S. Sup. Ct. Rule 28.1, St. Joseph's Hospital has no parent companies, subsidiaries or affiliates.

STATEMENT OF THE CASE

All of the relevant facts are more fully and accurately set forth by the Court of Appeals for the Second Circuit in its decision than they are in the Petition for a Writ of Certiorari. The court's decision is officially reported at 755 F.2d 260, and is attached as Appendix A to the Petition.

Petitioner filed an unfair labor practice charge with the National Labor Relations Board (hereinafter "Board") on December 17, 1982 alleging that Respondent St. Joseph's Hospital (hereinafter "the Hospital" or "Respondent") had violated sections 8(a)(1) and (5) of the National Labor Relations Act (hereinafter "the Act"). A hearing before Administrative Law Judge (hereinafter "ALJ") Winifred Morio was held on May 26, 1983. The ALJ issued a decision and recommended order in September, 1983 finding the Hospital had refused to bargain in good faith and ordering the Hospital to permit the union's representatives to examine its financial records. The Board affirmed the ALJ's decision without opinion. On June 7, 1984, the Board petitioned the Second Circuit Court of Appeals for enforcement of its Order. Petitioner intervened.

On February 14, 1985, the Second Circuit denied enforcement of the Board's Order. Contrary to Petitioner's characterization of the decision, the Court of Appeals held that the Hospital had not refused to bargain in good faith when it proposed certain qualifications to be met by Petitioner's auditor before the auditor would be permitted to examine the Hospital's financial records.

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals for the Second Circuit faithfully applied the principles previously enunciated by this Court. Indeed, the Second Circuit explicitly relied upon this Court's holdings in *Na-*

tional Labor Relations Board v. Truitt Manufacturing Co., 351 U.S. 149 (1956) and *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301 (1979).

Petitioner implicitly acknowledges that there is no direct conflict with the holdings in *Truitt*, *Detroit Edison*, and *National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432 (1967) by arguing only that the "broad principles" stated in those cases have been "improperly eroded" by the Second Circuit's decision. Both *Truitt* and *Acme* involved an employer's absolute refusal to provide information to a union, an issue entirely absent from the present case. *See* Petition, Appendix A at p.9a. Moreover, in *Truitt*, this Court explicitly rejected the existence of any automatic right of employees to evidence substantiating an employer's claimed inability to pay a wage increase, stating that "[e]ach case must turn upon its particular facts." 351 U.S. at 153.

Detroit Edison provides strong support for the Court of Appeals' decision. In that case, this Court recognized the existence of situations where an employer's conditional offer to disclose information is warranted. The employer had refused to disclose to the union actual test questions, answer sheets and personally identifiable scores of employee aptitude tests unless the employees involved gave consent. As a compromise, the employer suggested that the test battery and answer sheets be given to an industrial psychologist selected by the union for independent evaluation. Both the Board and the Sixth Circuit ordered the employer to turn over all requested material directly to the union, concluding that the union should be able to decide for itself whether it needed a psychologist to interpret the test battery and answer sheet. This Court reversed, holding that the Board had abused its discretion, stating:

> The Board's position appears to rest on the proposition that Union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established

> and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted.

440 U.S. at 318. Petitioner argues for such an "absolute rule" in the present case.

Nothing stated in *Truitt*, *Acme*, or *Detroit Edison* even implies that an employer may not propose that the union's accountant meet certain qualifications where the employer legitimately fears that labor strife may result from an inaccurate forecast of the employer's income by an unqualified auditor. Petitioner's inability to indicate an arguable conflict demonstrates that the Court of Appeals' decision in this case is in all respects consistent with the prior decisions of this Court and does not merit the Court's attention.

II. PETITIONER HAS NOT DEMONSTRATED THAT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS.

Petitioner's strained argument that the Court of Appeals' decision conflicts with decisions in other Circuits is also meritless. The cases cited by Petitioner do not involve facts or issues comparable to those presented here.

In *Metlox Manufacturing Company v. National Labor Relations Board*, 378 F.2d 728 (9th Cir. 1967), *enf'g*, 153 N.L.R.B. 1388 (1965), *cert. denied*, 389 U.S. 1037 (1968), the employer was found guilty of refusal to bargain, not because it required that the person examining its books be a certified public accountant approved by the employer, but because it was willing to allow access to its records only if the accountant was limited to informing the union whether the company's profit and loss statements "were true". The Ninth Circuit upheld the Board's finding that it was inconsistent with good faith bargaining for the company to insist upon limiting the accountant's disclosure to the union to a naked "yes or no" answer as to whether the profit and loss state-

ments furnished by the company fairly reflected the company's financial condition. That case did not hold that *all* limits on disclosure were unlawful; nor did it involve legitimate employer concern regarding the ability of the union's auditor to project the employer's earnings based on a complex reimbursement system. Thus, *Metlox* does not conflict with the Court of Appeals' decision in this case.

Petitioner also contends that the decision in *National Labor Relations Board v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963), *denying enforcement*, 134 N.L.R.B. 253 (1961) conflicts with the decision below. Any conflict is illusory because, as Petitioner recognizes, the Fifth Circuit rejected the Board's finding that the employer had withheld certain information from the Union. 318 F.2d at 478. Thus, that Court never decided whether an employer would violate the Act by failing to explain technical information to Union representatives. Any statement by the Fifth Circuit to this effect was *dicta*. Consequently, there was no "decision" on this issue which could conflict with that of the Second Circuit in the present case. Moreover, even if there had been a decision to this effect, no conflict would exist. In the present case, the Hospital did not seek to deny relevant information to Petitioner due to its complexity. Rather, it sought to insure that Petitioner would get an accurate explanation of that information - an aim which furthers the principle for which Petitioner cites *Tex-Tan*.

Nothing better demonstrates the absence of a conflict among the Circuits than Petitioner's labored efforts to find one with *Tex-Tan*. Furthermore, the Second Circuit's decision is wholly consistent with decisions by several Circuit Courts of Appeals recognizing the employer's right to propose and bargain with respect to the conditions under which it will disclose certain information. *See, e.g., Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301 (1979); *Shell Oil Co. v. N.L.R.B.*, 457 F.2d 615 (9th Cir. 1972); *Emeryville Research Center, Shell Development Co. v. N.L.R.B.*, 441 F.2d 880 (9th Cir. 1971); *Yakima Frozen Foods*,

130 N.L.R.B. 1269 (1961), *enforced in part and remanded in part sub nom. Fruit and Vegetable Packers and Warehousemen, Local 760 v. N.L.R.B.*, 316 F.2d 389 (D.C. Cir. 1963); *Westfork Cut Glass Co.*, 90 N.L.R.B. 944 (1950), *enforced and modified on other grounds sub nom. N.L.R.B. v. Borchert*, 188 F.2d 474 (4th Cir. 1951).

Inasmuch as this case is not comparable to those cited by Petitioner, it is not representative of a conflict and need not be reviewed on that basis.

III. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION.

Petitioner warns that the decision below will result in an "opportunity" for employers to frustrate and delay the collective bargaining process. These unsubstantiated fears do not call for this Court's review.

The Court of Appeals explicitly held that there had not been even an allegation that the Hospital raised its concerns in bad faith (Petition, Appendix A at p. 9a). Furthermore, as discussed above, the courts and the Board have repeatedly recognized certain situations in which an employer may condition the release of information to unions.

In addition, it is ironic that Petitioner should warn of an outbreak of dilatory bargaining tactics when Petitioner itself - and only the Petitioner - intentionally delayed bargaining for months by refusing to even discuss the Hospital's concerns. These actions prompted the Court of Appeals to hold that "such 'stonewalling' by a union should not be rewarded through enforcement action against the hospital." (Petition, Appendix A at p. 11a). Under the circumstances, these speculative fears of bargaining delays do not warrant review by this Court.

Petitioner also argues that the decision below makes an improper distinction between employees' representatives chosen for collective bargaining purposes and those chosen for other purposes. Again, the Union is straining to find a "special or important issue" where none exists. The Board has long recognized that an expert hired by a union to verify a claimed inability to pay has a function separate and distinct from that of a bargaining representative. Board decisions establishing a union's unfettered right to choose its representatives have dealt only with employee advocates such as union stewards or collective bargaining representatives. *E.g., Howland Hook Marine Terminal Corp.*, 263 N.L.R.B. 453 (1982); *Fitzsimmons Manufacturing Co.*, 251 N.L.R.B. 375 (1980); *Sears Roebuck & Co., Inc.*, 139 N.L.R.B. 471 (1962); *Oates Brothers, Inc.*, 135 N.L.R.B. 1295 (1962). In contrast, Petitioner's auditor did not act as an advocate or negotiator for unit employees and, therefore, can hardly be categorized as their "representative".

The auditor would not negotiate with the Hospital nor should he act as an advocate. The Board has held that a union is not entitled to review employer records for the purpose of enabling the union to suggest or urge efficiency or other changes which could make more funds available for wages. *Metlox Manufacturing Co.*, 153 N.L.R.B. 1388, 1395 (1965), *enf'd*, 378 F.2d 728 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968). An auditor's purpose is merely to determine if the Hospital's position, at the time it was put forth, is supported by the information contained in the records he reviews. *See Metlox Manufacturing Co. v. N.L.R.B.*, 378 F.2d 728, 729 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1068). Thus, the auditor does not fall into the same category as a union steward or bargaining representative, and the establishment of qualifications to ensure his expertise does not conflict with the purposes of the Act.

Respondent submits that the distinction drawn by the Court of Appeals between bargaining representatives and Petitioner's au-

ditor is not novel and, moreover, is logical, correct and in accord with the principles of the Act. Indeed, the Board has itself indicated that the selection of similar information analysts is an appropriate subject of bargaining. *See Winona Industries, Inc.*, 257 N.L.R.B. 695, 697-98 (1981) (union's selection of an industrial hygienist for analysis of employer safety and health information termed an appropriate subject of bargaining). Consequently, this issue does not require the attention of this Court.

Finally, Petitioner alleges that the Court of Appeals denied the Board its due deference. However, Petitioner does little more than mention this issue. There is no discussion of any specific infirmity in the Court of Appeals' approach. In fact, the Court of Appeals explicitly examined the appropriate scope of review and its decision reflects strict adherence to that standard. The Court of Appeals concluded that the Board's decision lacked substantial evidentiary support (Petition, Appendix A at p. 12a), and Petitioner has not demonstrated otherwise.

Accordingly, Petitioner has failed to raise any special or important issues which warrant this Court's attention.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated - July 15, 1985

Respectfully submitted,

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